

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

NIKKO JAYO,

Plaintiff and Appellant,

v.

KING SECURITY SERVICES, INC.,
et al.,

Defendants and Respondents.

A144341

(City & County of San Francisco
Super. Ct. No. CGC-13-529908)

Plaintiff Nikko Jayo sued his former employer as well as several employees of his former employer, claiming that he was physically assaulted during an incident at work. On appeal from a judgment in favor of defendants, plaintiff contends the evidence was insufficient to support the trial court's finding that no assault and battery occurred. We disagree with plaintiff and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff filed a verified complaint against his former employer, King Security Services, Inc. (King Security), as well as four employees of his former employer—Sergey Gorokhovskiy, Franklin Mwangi, Robert Cathey, and Michael Sugi (collectively, defendants).¹ He asserted various causes of action, including, as relevant here, a claim for civil assault and battery. Plaintiff alleged in his complaint that the individual

¹King American Ambulance Company was also named as a defendant but is not a party to this appeal.

defendants rushed him and beat him up in order to keep him from having a copy of a document that defendant Gorokhovsky demanded he sign.

The matter proceeded to a court trial in July 2014. Because no court reporter was present to transcribe the proceedings, the relevant facts are taken from the settled statement certified by the trial court.

Plaintiff was hired as a security guard by King Security in 2011. King Security assigned him to perform security guard services at the San Francisco Fire Credit Union. In December 2011, plaintiff's supervisor, defendant Sergey Gorokhovsky, scheduled a meeting with plaintiff at King Security's headquarters to discuss a disciplinary report concerning a complaint that plaintiff had been fraternizing too much with the employees at the credit union where he was assigned. Gorokhovsky testified that he had no intention of firing plaintiff and only intended to reassign him in response to a request from a supervisor at the credit union.

Gorokhovsky summoned plaintiff into his office, gave him a copy of the disciplinary report, and asked him to sign it. Plaintiff refused. Gorokhovsky gave plaintiff a copy of the report at plaintiff's request. Plaintiff then left Gorokhovsky's office and returned a short time later holding what appeared to be a copy of the disciplinary report. Gorokhovsky attempted to pick up a piece of paper from the corner of his desk that he thought was a disciplinary report for another employee. Plaintiff yelled, "It is mine," and then engaged in a tug of war with Gorokhovsky over the piece of paper. They ended up in the hallway outside of Gorokhovsky's office, where King Security employees Mwangi, Cathey, and Sugi grabbed plaintiff's arm and sought to separate him from Gorokhovsky. The individual defendants then escorted plaintiff out of the building.² All of the individual defendants testified that no one kicked or punched or beat plaintiff in any manner whatsoever. The individual defendants also each testified that plaintiff never fell to the ground during the encounter.

²Cathey and Sugi testified that plaintiff ran from the building after being separated from Gorokhosvsky.

Plaintiff testified to a different version of the encounter. He claimed that when he returned to Gorokhovsky's office with a copy of the disciplinary report, Gorokhosvky threatened to terminate plaintiff if he refused to sign the report. According to plaintiff, Gorokhovsky reached into plaintiff's bag in an apparent effort to retrieve plaintiff's copy of the report. Plaintiff testified that he and Gorokhosvky engaged in a tug of war after Gorokhovsky pulled various items out of the bag, including plaintiff's copy of the disciplinary report. He further testified that Mwangi, Cathey, and Sugi came up to him from behind, forced him to the floor, and punched and kicked him while Gorokhosvky continued to go through plaintiff's bag. Gorokhosvky denied searching through plaintiff's bag or removing any items from it. Plaintiff testified that he ran from the building after being on the floor for about three minutes.

Plaintiff walked across the street from King Security's headquarters following the incident and called the police as well as an ambulance. When San Francisco Police officer Nelson Ramos arrived on the scene, he first spoke with Gorokhovsky, who told the officer that plaintiff became aggressive when Gorokhovsky told him he was being terminated. The officer then approached plaintiff and asked if there was anything wrong, to which plaintiff replied, "Nothing." According to plaintiff, he refused to speak with Officer Ramos at the outset because he did not trust him and because the officer purportedly spoke in a threatening manner toward him. Officer Ramos returned some time later to speak with plaintiff, who then reported that he had been assaulted "in front of the building."

The court issued a final statement of decision in November 2014 in which it adopted a proposed statement of decision it had previously supplied to the parties. The court found for defendants on all of the causes of action, including the cause of action for civil assault and battery. In discussing the cause of action for civil assault and battery, the court cited the elements of battery and assault as set forth in CACI No. 1300 and CACI No. 1301. The court found that no assault and battery occurred. The court noted that "there was touching or pulling or maybe even some pushing" during the encounter, but that "none of that physical contact rose to the level of the kicking and beating"

alleged by plaintiff. The court found that the individual defendants “had no intention of causing any harmful or offensive contact with plaintiff” and “only wanted to make sure the plaintiff would leave the building and not cause any further disturbance.” In support of its decision, the court cited the lack of physical injury to plaintiff, the lack of any motive by the individual defendants to carry out an assault and battery, and plaintiff’s lack of credibility as a witness.

Following entry of judgment in favor of defendants, plaintiff timely appealed.

DISCUSSION

Plaintiff’s sole claim on appeal is that the evidence is insufficient to support the trial court’s finding that no assault and battery occurred. He contends the decision is a “clear abuse of discretion” because none of the defendants pleaded self-defense and each of them admitted touching plaintiff without his consent. Although he concedes that the evidence is in conflict concerning the manner in which he was touched, he nonetheless argues that the evidence is uncontradicted that defendants engaged in an offensive and nonconsensual touching, which should entitle him to an award of at least nominal damages in the absence of a pleaded and proven affirmative defense of self-defense.

We apply a substantial evidence standard of review to a court’s findings of fact contained in its statement of decision. (*Citizens Business Bank v. Gevorgian* (2013) 218 Cal.App.4th 602, 613.) Under that deferential standard of review, we defer to the trial court’s findings if they are supported by substantial evidence. (*Niko v. Foreman* (2006) 144 Cal.App.4th 344, 364.) We consider the evidence in the light most favorable to the court’s determination, resolve all conflicts in the evidence in the light most favorable to the prevailing party, and draw all reasonable inferences in support of the findings. (*Citizens Business Bank v. Gevorgian, supra*, at p. 613.) A single witness’s testimony may constitute substantial evidence to support a finding. (*Ibid.*) It is not our role as a reviewing court to reweigh the evidence or assess witness credibility. (*Niko v. Foreman, supra*, at p. 365.)

The “elements of a cause of action for assault are (1) defendant acted with intent to cause harmful or offensive contact, or threatened to touch plaintiff in a harmful or

offensive manner; (2) plaintiff reasonably believed [he] was about to be touched in a harmful or offensive manner or it reasonably appeared to plaintiff that defendant was about to carry out the threat; (3) plaintiff did not consent to defendant's conduct; (4) plaintiff was harmed; and (5) defendant's conduct was a substantial factor in causing plaintiff's harm. [Citations.] The essential elements of a cause of action for battery are: (1) defendant touched plaintiff, or caused plaintiff to be touched, with the intent to harm or offend plaintiff; (2) plaintiff did not consent to the touching; (3) plaintiff was harmed or offended by defendant's conduct; and (4) a reasonable person in plaintiff's position would have been offended by the touching." (*So v. Shin* (2013) 212 Cal.App.4th 652, 668–669; CACI Nos. 1300, 1301.)

It is undisputed that plaintiff was touched by the individual defendants and that he did not consent to the touching. Plaintiff seems to think that it enough to justify at least an award of nominal damages for assault and battery. He is mistaken. Claims for assault and battery require the plaintiff to establish that a defendant *intended* to touch the plaintiff in a *harmful* or *offensive* manner. (*So v. Shin, supra*, 212 Cal.App.4th at pp. 668–669.) Here, the court found that the individual defendants did not intend to harm or offend plaintiff by touching him during the encounter with Gorokhovsky. This finding is supported by substantial evidence.

The court was entitled to believe the testimony of the individual defendants who claimed that they simply responded to a “tug of war” between Gorokhovsky and plaintiff, with the intent to separate them and prevent an altercation. The individual defendants testified that plaintiff did not fall to the floor and was not kicked or punched. The evidence established that plaintiff suffered no physical harm. Further, the court reasoned that the individual defendants had no motive to commit an assault and battery, and it concluded that plaintiff was not credible in light of his failure to report the incident to the responding officer during their first encounter. The evidence was more than sufficient to support a finding that the individual defendants lacked the intent to harm or offend plaintiff. Accordingly, substantial evidence supports the court's determination that no assault or battery occurred.

Plaintiff claims the evidence here is “exactly” as in *Griswold v. Hollywood Turf Club* (1951) 106 Cal.App.2d 578, which involved a race track patron who was forcibly removed from the premises. We disagree. There, the appellate court held that the trial court erred in denying the plaintiff’s motion for new trial upon charges of assault and battery where it was proven that race track guards attempted to forcibly eject the plaintiff from the race track’s clubhouse. (*Id.* at p. 584.) Insofar as plaintiff claims *Griswold* stands for the proposition that removing a person from premises necessarily amounts to assault and battery whenever the person is touched without his consent, he is incorrect. The touching must be considered harmful or offensive to a reasonable person, and the defendant must have intended to touch the plaintiff in a harmful or offensive manner. (See *So v. Shin, supra*, 212 Cal.App.4th at pp. 668–669.) In *Griswold*, it was undisputed that the race track guards tripped the plaintiff, tore his clothes, broke his glasses, handcuffed him, and placed him under arrest. (*Griswold v. Hollywood Turf Club, supra*, at p. 580.) “There was no conflict in the evidence upon these essentials of the assault and battery committed in a violent and aggravated manner.” (*Id.* at p. 584.) In *Griswold*, the undisputed evidence supported an inference that the defendants *intended* to touch the plaintiff in a manner that any reasonable person would consider to be harmful and offensive. Here, by contrast, the evidence concerning the manner in which plaintiff was touched was in conflict. The trial court was entitled to credit the testimony of the defense witnesses, whose version of the encounter supports an inference that they lacked any intent to touch plaintiff in a harmful or offensive manner.

Plaintiff goes to great lengths to discuss the affirmative defense of self-defense, suggesting that defendants’ failure to plead and prove the defense is fatal to their case. He also complains that the court file failed to include a copy of defendants’ verified answer, which would confirm that they failed to plead self-defense as an affirmative defense. The absence of the answer is immaterial because defendants concede that they did not plead self-defense. Further, there was no need to plead self-defense in this case. As discussed above, plaintiff failed to prove all of the elements of his cause of action for civil assault and battery. It is unnecessary to consider an affirmative defense to a cause

of action when the plaintiff has not even met his burden to prove the elements of the cause of action.

As a final matter, defendants seek monetary sanctions against plaintiff for filing a frivolous appeal. Among other things, defendants claim plaintiff failed to comply with applicable rules of court and advanced a frivolous legal argument that is unsupported by the record. They also take plaintiff to task for using hyperbole in describing the trial court's decision as "shameful."

An appeal is frivolous "when any reasonable attorney would agree that the appeal is totally and completely without merit." (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650.) "[T]o avoid a serious chilling effect on the assertion of litigants' rights on appeal" (*ibid.*), sanctions for frivolous appeals "should be used most sparingly to deter only the most egregious conduct" (*id.* at p. 651) and are justified only in " 'the clearest cases' " (*id.* at p. 650). Under that standard, this appeal does not warrant an award of sanctions even though it is plainly unmeritorious.

DISPOSITION

The judgment is affirmed and the motion for monetary sanctions is denied. Respondents shall be entitled to recover their costs on appeal.

McGuiness, P.J.

We concur:

Pollak, J.

Siggins, J.

A144341, *Jayo v. King Security Services, Inc.*